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IN THE

United States Supreme Court

OCTOBER, 1994, TERM

DOUGLAS ROWLAND STARNES,

Petitioner,

VS. CASE NO: _____

UNITED STATES OF AMERICA,

Respondent.

APPENDIX

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IN THE UNITED STATES
SUPREME COURT
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RESPONDENT

APPENDIX

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IN THE UNITED STATES
DISTRICT COURT FOR THE
WESTERN DISTRICT OF
TENNESSEE

UNITED STATES OF AMERICA,
PLAINTIFF

VS. CR. NO: 92-20328-G

DOUGLAS ROWLAND STARNES
DAVID CHRISTIAN BULLINGTON,
DEFENDANTS

ORDER ON JURY VERDICT

This cause came on for trial on April 5, 1993, the United States Attorney representing the Government and the defendants, Douglas Rowland Starnes and David Christian Bullington, appearing in person and with counsel, Mr. Edwin Lenow and Mr. William Craig Hall, respectively.

Jurors were selected and sworn and opening statements were presented by counsel. After listening to all the evidence, arguments of counsel, and charge of the Court, the Jury began its deliberations. After due deliberations, the Jury returned into

open court on April 7, 1993, and announced a verdict of Not Guilty as to Defendant, David Christian Bullington. Defendant, David Christian Bullington is hereby dismissed from case. The Jury, as to defendant, Douglas Rowland Starnes, announced a verdict of Guilty to Count One and Two as charged in the indictment.

Sentencing will be set upon completion of the presentence report. In the meantime, defendant may remain on his present bond.

IT IS SO ORDERED this 19th day of April, 1993.

JULIA SMITH GIBBONS
UNITED STATES DISTRICT
COURT JUDGE

CHRISTOPHER E. COTTEN
ASSISTANT UNITED STATES
ATTORNEY

IN THE UNITED STATES
DISTRICT COURT FOR THE
WESTERN DISTRICT OF
TENNESSEE

UNITED STATES OF AMERICA,
PLAINTIFF

VS. CR. NO: 92-20328-G

DOUGLAS ROWLAND STARNES
DEFENDANT

ORDER ON MOTIONS FOR NEW TRIAL

Presently before the Court are the defendant's motions for new trial, which were heard on June 18, 1993. For reasons expressed and referred to at that hearing, those motions are denied.

IT IS SO ORDERED. This 28th day of June, 1993.

HONORABLE JULIA SMITH
GIBBONS
UNITED STATES DISTRICT JUDGE

APPROVED:
DANIEL A. CLANCY
United States Attorney

BY: _____
CHRISTOPHER E. COTTEN
Asst. United States Attorney

No: 93-5931

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA

Plaintiff-Appellee,

vs.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TENNESSEE

DOUGLAS ROWLAND STARNES,

Defendant-Appellant.

Decided and Filed _____

BEFORE NELSON and NORRIS, Circuit Judges, and ENGLE, Senior Circuit Judge.

PER CURIAM. The Defendant was found guilty by jury of participating in a conspiracy to distribute marijuana and to possess the drug with intent to distribute it, all in violation of 21 U.S.C. Section 846. He appeals his conviction and sentence, contending (1) that a violation of his due process rights occurred when a

forensic toxicologist was allowed to identify the substance in question as marijuana notwithstanding that the government had failed to provide the defendant a copy of the laboratory test results in advance; (2) that the district court erred in allowing a co-conspirator to testify that a purchase of 35 to 40 pounds of marijuana would be associated with distribution rather than personal use; and (3) that the district court erred in determining the quantity of marijuana involved in the conduct deemed relevant for sentencing purposes. Finding none of these contentions persuasive, we shall affirm both the conviction and the sentence.

I.

The defendant, Douglas Starnes, was indicted on the marijuana charges in November of 1992. Also charged in the indictment were Alvin Godair,

Patrick Fox and David Bullington. Messrs. Godair and Fox entered into pretrial plea agreements with the government, while Bullington and Starnes chose to stand trial. Mr. Starnes was convicted, and Mr. Bullington was acquitted. On June 18, 1993, Starnes was sentenced to a prison term of 78 months; this appeal followed.

The evidence indicated that in October of 1992 Messrs. Fox and Bullington travelled from Memphis to Brownsville, Texas, where they purchased some seventy pounds of marijuana and arranged to have it shipped to Memphis in computer boxes. A manager at the freight company became suspicious and summoned police officers. A police drug dog reacted positively to the boxes, whereupon the officers obtained search warrants and opened the containers. Finding marijuana inside, they resealed the

boxes, sent them on to Memphis, and notified law enforcement officials in that city. When the boxes arrived in Memphis, local police officers and agents of the Drug Enforcement Agency arrested Messrs. Bullington and Fox as they attempted to take delivery of the containers.

Mr. Fox agreed to cooperate with the officials, and they arranged a controlled delivery of the boxes to Mr. Godair. He was arrested too, and likewise agreed to cooperate with the officers. Godair then called Mr. Starnes and arranged to deliver the boxes to him at a shopping center parking lot. It was there that Mr. Starnes was arrested, after four of the boxes had been loaded into the trunk of his car.

Godair, Fox and Fox's girlfriend all testified at trial that Mr. Starnes had paid between $20,000.00 and $30,000.00 to purchase some

thirty-five to forty pounds of the marijuana contained in the boxes. Starnes, on the other hand, testified that he believed that the boxes contained "children's computers"; he said that he had agreed to pay less than one hundred dollars for them.

Forensic toxicologist Harold Nichols took the stand as a government witness. Mr. Nichols had analyzed the substance found in the boxes and concluded that it was marijuana. Mr. Starnes objected to this witness being all owed to testify, Starnes not having received a copy of the toxicology report in advance of the testimony. (Starnes had previously requested any such report under Rule 16, Fed. R. Crim. P., but the government had failed to produce a copy.) The prosecutory told the court that the report had been prepared only the day before and that the government had not been

withholding it from the defendant intentionally. Observing that the government "probably should have gone ahead and given it to [Starnes] yesterday," the court found that the defendant would not be prejudiced if the report were submitted to him for inspection prior to Mr. Nichols testimony. Mr. Starnes did not request a recess or a continuance, and he did not cross-examine Mr. Nichols.

Wayne Godair also testified as a government witness. He told the jury that defendant Starnes had made approximately five trips from Tennessee to Texas to purchase marijuana. Godair said that he accompanied Starnes on some of these trips and that Fox accompanied him on others, but that he (Godair) profited financially from each of the trips. He acknowledged that he had been convicted in 1984 and 1989 on charges

of possession of marijuana with intent to distribute it. After this testimony was given, the government asked Godair the following question:

> "Now, as somebody who has been in the marijuana business yourself, is [thirty-five to forty pounds of marijuana] a quantity you would associate with personal use or a quantity you would associate with distribution?"

The defendant objected, arguing that the government be required to "qualify the witness a little bit further." In response, the government argued that Mr. Godair was testifying based on his extensive personal experience in the marijuana business. The court overruled the objection, and Mr. Godair stated that such an amount would normally be associated with distribution.

Mr. Godair was then asked this question: "Say you were going to buy some marijuana for your personal use, how much would you buy at one time?" Again, the defendant objected, and

again the objection was overruled. Godair testified that if he were buying marijuana for personal use, he would buy one-quarter of an ounce.

II.

A

We turn now to the belated toxicology report. It is well established that the Due Process Clause of the Fifth Amendment does not guarantee a criminal defendant any right to discovery of evidence the government intends to use at trial. Weatherford vs. Bursey, 429 U.S. 545, 559 (1977). The delay in producing the report thus did not amount to a constitutional violation.

Rule 16(a)(1)(D) of the Federal Rules of Criminal Procedure provides that, "[U]pon request of a defendant the government shall permit the defendant to inspect and copy....any results or reports of...scientific tests...which are within the

possession, custody, or control of the government..." Subsection (d) of the rule vests the trial court with discretion to enforce discovery requests through orders "prescrib[ing] such terms and conditions [of discovery] as are just." See United States vs. Glover, 846 F.2d 339, 342 (6th Cir.), cert. denied, 488 U.S. 982 (1988). Absent a showing of willful impropriety in the withholding of evidence, a trial court is not required to exclude evidence that should have been turned over to an adverse party during discovery; such exclusion is, however, an option the court may exercise in enforcing Rule 16. United States vs. Bartle, 835 F.2d 646, 649 (6th Cir. 1987), cert. denied, 485 U.S. 969 (1988).

No willful impropriety has been shown in the case at bar, and we do not believe that the trial court

abused its discretion in allowing the toxicologist to testify. Although Mr. Starnes had not seen the toxicology report until just before the testimony was given, he did not ask for a recess to examine the report with care. Neither did he request a continuance so that he could submit the report to independent experts for evaluation. In these respects this case resembles United States vs. Kubiak, 704 F.2d 1545 (11th Cir.), cert. denied, 464 U.S. 852 (1983), which our court cited with approval in Bartle, 835 F.2d at 650. In the Kubiak case, the Eleventh Circuit stated:

> "The appellant simply asserts that the government's untimely disclosure of the lab report denied him his right to effectively challenge the report or pursue further discovery concerning the evidence or the government witness. We note, however, that the only step taken by the defense to relieve itself from the predicament it now complains of, was its request that the chemist's testimony be stricken from the

> record. The defense never asked for a recess, let alone a continuance, to give it an opportunity to review the report...To put is simply, the prejudice now complained of by the appellant 'could perfectly well have been [rectified] by a recess. Absent such a request the court cannot be faulted for having denied the request to preclude the [g]overnment from alluding to the [report] in question." 704 F.2d at 1552 (citations omitted.)

Mr. Starnes did not contend at trial that he was unfairly surprised by Mr. Nichols' proffered testimony, nor did he complain that his lack of access to the report had left him inadequately prepared to proceed. He merely requested that the report and Mr. Nichols' testimony be excluded. The trial court did not abuse its discretion in denying the request.

B

The defendant also challenges his conviction on the ground that the trial court improperly allowed Mr. Godair to express an opinion on the ultimate issue of Mr. Starnes' guilt,

a question within the exclusive province of the jury. We see on impropriety in mr. Godair's testimony. Mr. Godair was shown to have been personally involved in the business of dealing in marijuana, and based on his personal experience he testified that a purchase of thirty-five to forty pounds of marijuana would be associated with distribution rather than personal use. Such testimony did not amount to an impermissible legal conclusion. The normal order of magnitude of purchases of marijuana for personal use is a question of fact, just as the orders of magnitude that could be expected in purchases for redistribution constitutes a question of fact. The witness was subject to cross-examination on the extent of his knowledge on these matters, and Mr. Starnes was free to try to impeach his credibility by showing

that it would be in Godair's interest to curry favor with the government. Godair's testimony was relevant and probative, and the court did not err in admitting it.

III

Mr. Starnes attacks his sentence on the ground that the district court held him responsible for a larger amount of marijuana than it should have done. Based on the trial testimony of Messrs. Godair and Fox, the court held Mr. Starnes responsible for two shipments that preceded the one for which he was convicted: a shipment of thirty pounds of marijuana from Texas to Tennessee early in the summer of 1992, and another shipment of thirty pounds about a month later. The court found that the defendant was involved in the planning and execution of both shipments, and that these shipments, like the October

shipment for which Starnes was convicted, were part of the same distribution scheme. The court also held Starnes accountable for the entire seventy pounds of marijuana shipped in October, 1992, notwithstanding Starnes' claim that he planned to purchase only half of that shipment. These findings led to Starnes being assigned a base offense level of 20 under the United States Sentencing Guidelines.

U.S.S.G Section 1B1.3(a)(2) provides that, in setting the base offense level for a defendant convicted of a narcotics distribution crime, the court should consider "all acts and omissions...that were part of the same course of conduct or common scheme or plan as the offense of conviction." Trial testimony by Mr. Starnes' co-conspirators provided the court with an ample factual basis for concluding that the course of

conduct that cultivated in Starnes' arrest reached back at least to the summer of 1992 and encompassed the two prior shipments. The testimony was not too vague to support the court's finding.

It is not necessary for us to resolve the question of whether Starnes should have been held responsible for the full 70 pounds of marijuana in the October shipment, or only half that amount, because his base offense level would have been the same in either case. If held responsible for only thirty-five pounds (15.876 kg) in October, he would still have had a base offense level of 20 when the 27.216 kg from the earlier shipments were added in. (Anything between 40 kg and 60 kg. yields a base offense level of 20, and Mr. Starnes would have been responsible for more than 43 kg even if only half the October shipment had

been counted.

The defendant's conviction and sentence are AFFIRMED.

SENTENCING COMMISSION

GUIDELINES MANUAL SECTION 2D1.4

Section 2d1.4 Attempts and Conspiracies

(a) Base Offense Level: If a defendant is convicted of a conspiracy or an attempt to commit any offense involving a controlled substance, the offense level shall be the same as if the object of the conspiracy or attempt had been completed.

Commentary

Statutory Provisions: 21 U.S.C. Sections 846, 963, For additional statutory provision(s), see Appendix A (Statutory Index)

Application Notes:

1. If the defendant is convicted of a conspiracy that includes transactions in controlled substances in addition to those that are the subject of substantive counts of conviction, each conspiracy transaction shall be included with those of the substantive counts of conviction to determine scale. If the defendant is convicted of an offense involving negotiation to traffic in a controlled substance, the weight under negotiation in an uncompleted distribution shall be used to calculate the applicable amount. However, where the court finds that the defendant did not intend to produce and was not

reasonably capable of producing the negotiated amount, the court shall exclude from the guideline calculation the amount that it finds the defendant did not intend to produce and was not reasonably capable of producing. If the defendant is convicted of conspiracy, see Application Note 1 to Section 1B1.3 (Relevant Conduct).

2. Where there is no drug seizure or the amount seized does not reflect the scale of the offense, the sentencing judge shall approximate the quantity of the controlled substance. In making this determination, the judge may consider, for example, the price generally obtained for the controlled substance, financial or other records, similar transactions in controlled substances by the defendant, and the size or capability of any laboratory involved.

3. See Commentary to Section 2D1.1 regarding weapon possession.

Section 1B1.3 Relevant Conduct (Factors that Determine the Guideline Range)

(a) Chapters Two (Offense Conduct) and Three (Adjustments). Unless otherwise specified, (i) the base offense level where the guidelines specifies more than one base offense level, (ii) specific offense characteristics and (iii) cross references in Chapter Two, and (iv) adjustments in Chapter Three, shall be determined on the basis of the following:

(1) all acts and omissions committed or aided and abetted by the defendant, or for which the defendant would be otherwise accountable, that occurred during the commission of the offence of conviction, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense, or that otherwise were in furtherance of that offense;

(2) solely with respect to offenses of a character for which Section 3D1.2(d) would require grouping of multiple counts, all such acts and omissions that were part of the same course of conduct or common scheme or plane as the offense of conviction;

(3) all harm that resulted from the acts or omissions specified in subsections (a)(1) and (a)(2) above, and all harm that was the object of such acts or omissions; and

(4) any other information specified in the applicable

guideline.

(b) Chapters Four (Criminal History and Criminal Livelihood) and Five (Determining the Sentence). Factors in Chapters Four and Five that establish the guideline range shall be determined on the basis of the conduct and information specified in the respective guidelines.

Commentary

Application Notes:

1. Conduct "for which the defendant would be otherwise accountable," as used in subsection (a)(1), includes conduct that the defendant counseled, commanded, induced, procured, or willfully caused. (Cf. 18 U.S.C. Section 2.) In the case of criminal activity undertaken in concert with others, whether or not charged as a conspiracy, the conduct for which the defendant "would be otherwise accountable" also includes conduct of others in furtherance of the execution of the jointly-undertaken criminal activity that was reasonably foreseeable by the defendant. Because a count may be broadly worded and include the conduct of many participants over a substantial period of time, the scope of the jointly-undertaken criminal activity, and hence relevant conduct, is not necessarily the same for every participant. Where it is established that the conduct was neither within the scope of the defendant's agreement, nor was reasonably foreseeable in connection with the criminal activity the defendant agreed to jointly undertake, such conduct is not included in establishing the defendant's offense level under this guideline.

In the case of solicitation, misprision, or accessory after the fact, the conduct for which the defendant "would be otherwise accountable" includes all conduct relevant to determining the offense level for the underlying offense that was known, or reasonably should have been known, by the defendant.

Illustrations of Conduct for Which the Defendant is Accountable

a. Defendant A, one of ten off-loaders hired by Defendant B, was convicted of importation of marihuana, as a result of his assistance in off-loading a boat containing a one-ton shipment of marihuana. Regardless of the number of bales of marihuana that he actual unloaded, and notwithstanding any claim on his part that he was neither aware of, or could reasonably foresee, that the boat contained this quantity of marihuana, Defendant A is held accountable for the entire one-ton quantity of marihuana on the boat because he aided and abetted the unloading and hence the importation, of the entire shipment.

b. Defendant C, the getaway driver in an armed bank robbery in which $15,000.00 is taken and a teller is injured, is convicted of the substantive count of bank robbery. Defendant C is accountable for the money taken because he aided and abetted the taking of the money. He is accountable for the injury inflicted because he participated in concerted criminal conduct that he could reasonably foresee might result in the infliction of injury.

c. Defendant D pays Defendant E a small amount to forge an endorsement

on an $800 stolen government check. Unknown to Defendant E, Defendant D then uses that check as a downpayment in a scheme to fraudulently obtain $15,000 worth of merchandise. Defendant E is convicted of forging the $800 check. Defendant E is not accountable for the $15,000 because the fraudulent scheme to obtain $15,000 was beyond the scope of, and not reasonably foreseeable in connection with, the criminal activity he jointly undertook with Defendant D.

d. Defendants F and G, working together, design and execute a scheme to sell fraudulent stocks by telephone. Defendant F fraudulently obtains $20,000. Defendant G fraudulently obtains $35,000. Each is convicted of mail fraud. Each defendant is accountable for the entire amount ($55,000) because each aided and abetted the other in the fraudulent conduct. Alternatively, because Defendants F and G engaged in concerted criminal activity, each is accountable for the entire $55,000 loss because the conduct of each was in furtherance of the jointly undertaken criminal activity and was reasonably foreseeable.